No. 82-2043

In the Supreme Court of the United States

OCTOBER TERM, 1983

CHARLES T. WALSH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that petitioner waived a possible statute of limitations defense based on acquittal of an alleged co-conspirator by failing to raise it in the trial court.

2. Whether a defendant may receive separate sentences for a substantive RICO offense and the predicate offenses on which the RICO violation is premised.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 700 F.2d 846.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1983 (Pet. App. 30a). A petition for rehearing was denied on April 15, 1983 (Pet. App. 25a-26a). The petition for a writ of certiorari was filed on June 13, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of conducting an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"),

18 U.S.C. 1962(c) (Count 1); three counts of interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952 (Counts 3, 5, and 6); one count of obstruction of interstate commerce by extortion, in violation of 18 U.S.C. 1951 (Count 4); and two counts of conspiracy, in violation of 18 U.S.C. 371 (Counts 2 and 7).[1] Petitioner was sentenced to concurrent terms totaling 12 years' imprisonment[2] and cumulative fines of $25,000 on Count 1 and $10,000 on each of Counts 2 through 7, for a total of $85,000. In addition, the jury returned a special verdict on Count 1 requiring petitioner to forfeit 55% of his interest in Bowe, Walsh & Associates ("BWA"), a Long Island-based engineering firm. The court of appeals affirmed.

1. The evidence at trial (see Pet. App. 2a-14a) showed that petitioner was the senior partner and principal owner of BWA. During the 12-year period from 1967 through 1979, petitioner engaged in a pattern of corrupt and illegal activities in New York, New Jersey, and Connecticut. After petitioner's company was hired as a consulting engineer for several major sewer construction projects in the tri-state

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[1]Count 1 charged petitioner and Martin Gabey with the RICO violation; Count 3 charged Travel Act violations by petitioner and Gabey; Count 4 charged Hobbs Act violations by petitioner and Gabey; Counts 5 and 6 charged Travel Act violations by petitioner, Angelo Errichetti, and Vincent Cuti; Count 2 charged a conspiracy involving petitioner, Bowe, Walsh & Associates ("BWA"), and Gabey; and Count 7 charged a conspiracy involving petitioner, BWA, and Nicholas Barbato.

The trials of Gabey and Errichetti were severed from the trial of petitioner and the others (Pet. App. 7a n.1). BWA and Cuti were convicted of all charges against them, while Barbato was acquitted on Count 7.

[2]Petitioner was sentenced to terms of 12 years' imprisonment on each of Counts 1 and 4 and five years' imprisonment on each of Counts 2, 3, 5, 6, and 7. All terms of imprisonment were to run concurrently, except that Counts 5 and 6 were to run consecutively to Counts 2, 3, and 7. See Pet. App. 28a.

area, petitioner systematically extorted money from project contractors under his company's control and fraudulently overstated payment claims. Petitioner then used the proceeds of the inflated claims to bribe public officials to obtain additional municipal contracts and other forms of preferential treatment for BWA (*id.* at 3a-6a). In all, petitioner bribed officials of five jurisdictions that awarded contracts to petitioner's firm.

In 1967, petitioner and the second-ranking BWA employee met with the chairman of the Board of Commissioners of the Sewer District of Rockland County, New York, a jurisdiction that had hired BWA as primary consulting engineer on a major sewer project. The chairman agreed to assist BWA with any problems regarding bills it submitted if petitioner would pay the chairman kickbacks generated by overstated payment claims. At petitioner's direction, Martin Gabey and another BWA employee inflated several contractors' payment certificates, collected the cash to be used as kickbacks, and delivered it to petitioner. Petitioner also paid off an official of the township of Parsippany-Troy Hills, New Jersey, where BWA held a position as consultant on a major sewer project, in return for the official's assistance in expediting the township's payments to BWA (Pet. App. 3a-4a).

In 1971 petitioner arranged for payments to the chairman of the Public Utility Commission of Wallingford, Connecticut, another municipality engaged in a large sewer project. Between 1970 and 1977 the members of the commission, including its chairman, approved a series of BWA contracts and proposals relating to the sewer project. Also in 1971, petitioner obtained lucrative engineering contracts from Suffolk County, New York, with the assistance of co-defendant Nicholas Barbato, then chairman of a local political committee, to whom BWA had promised a large kickback. Petitioner then extorted the necessary cash from the

project contractors by threats of economic reprisals (Pet. App. 4a-5a).

Finally, in 1977 petitioner's company received a sewer contract in Camden County, New Jersey, by promising Angelo Errichetti, Mayor of Camden, that he would receive $40,000 for his assistance. In 1979, petitioner mailed Errichetti another proposal for a study of Camden's sewer system. Errichetti initially declined to cooperate because he had never received the $40,000 payment promised earlier. On August 8, 1979, co-defendant Vincent Cuti, BWA's General Counsel, met with Errichetti. The meeting was also attended by government informant Melvin Weinberg and FBI undercover agent Anthony Amoroso, who were participants in the ongoing "ABSCAM" investigation of Errichetti. Cuti stated that he would "straighten out" the problem of Errichetti's failure to receive the bribe and that BWA wished to obtain work in Camden. On August 20, petitioner and Cuti met with Errichetti, Weinberg, and Amoroso in New York City. During the meeting petitioner reaffirmed that Errichetti would be paid to "rejuvenate" BWA's proposal for work in Camden. On September 10, Cuti passed $10,000 in cash to Weinberg, stating that "this is for the Mayor" (Pet. App. 5a-6a, 12a-13a).

2. The court of appeals affirmed (Pet. App. 1a-22a). It held that the evidence was sufficient to prove that the requisite RICO predicate offenses had occurred within the limitations period (*id.* at 7a-9a) and to support the Hobbs Act (Count 4) and Travel Act (Counts 3, 5, and 6) convictions (Pet. App. 9a-14a). The court concluded that petitioner had waived a statute of limitations defense in connection with his Count 7 conspiracy conviction by failing to raise it at trial (*id.* at 15a-18a) and that cumulative fines imposed for the RICO conviction and four of the predicate offenses on which it was premised did not constitute impermissible multiple punishments (*id.* at 18a). The court rejected

petitioner's contention that the special RICO forfeiture verdict should be vacated (*id.* at 19a-21a). Finally, it concluded that the jury instructions were proper and that the government's in camera proffer of evidence did not prejudice petitioner's right to a fair trial (*id.* at 21a-22a).

ARGUMENT

Petitioner challenges his conspiracy conviction on Count 7 on statute of limitations grounds. In addition, he contends that his conviction on both the substantive RICO count (Count 1) and counts involving four predicate acts of racketeering (Counts 3 through 6) violated the Double Jeopardy Clause of the Fifth Amendment. These contentions are without merit, and further review is not warranted.[3]

1. Petitioner contends (Pet. 5-10) that his conspiracy conviction under Count 7 should be set aside on the ground that it was barred by the statute of limitations. Petitioner does not contend that there was insufficient evidence to prove the existence of a conspiracy or his membership in it; nor does he claim that the government failed to prove that the conspiracy continued to operate during the limitations

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[3]Petitioner does not challenge all of the counts on which he was convicted. His 12-year term of imprisonment would not be affected by the issues he raises because the district court imposed concurrent sentences of imprisonment (including concurrent 12-year terms of imprisonment on Counts 1 and 4). See page 2, note 2, *supra*. Thus, petitioner seeks primarily to reduce the amount of the fines assessed against him. Petitioner's suggestion (Pet. 16-17) that if he were to prevail on the points he raises it would be appropriate to remand for resentencing is insubstantial. As the court of appeals observed (Pet. App. 2a-3a), during a 12-year period petitioner and his colleagues "engaged in an audacious pattern of corrupt and illegal activities in New York, New Jersey and Connecticut" and acted "outrageously." Thus, even if petitioner were to prevail on the contentions he raises, there is no reason to believe that the district court would be inclined to reduce the sentences on the remaining counts. And, of course, petitioner is in any event free to move the district court for reduction of his sentence within the time limits provided by Fed. R. Crim. P. 35.

period. Rather, he premises his contention on the facts that only two of the overt acts listed in the indictment under Count 7 fell within the five-year limitations period, and that both of those acts allegedly were committed by co-defendant Barbato. Under petitioner's theory, Barbato's acquittal on the conspiracy charge (see page 2, note 1, *supra*) means that the government failed to prove the commission of any overt act within the five-year limitations period.

The court of appeals held (Pet. App. 15a-18a) that petitioner had waived a statute of limitations defense because he failed to raise it in the trial court. Petitioner urges, however, that the statute of limitations is a "jurisdictional" bar to prosecution and that it therefore can be raised for the first time on appeal. Similar contentions have been presented to this Court on several occasions in recent years, and the Court has denied certiorari on each occasion. See *Williams* v. *United States*, No. 82-5411 (Jan. 10, 1983); *Akmakjian* v. *United States*, 454 U.S. 964 (1981); *Wild* v. *United States*, 431 U.S. 916 (1977).[4] Moreover, the fact situation that forms the basis of petitioner's claim that he should not be held to have waived the statute of limitations defense is an unusual one. Thus, petitioner's contention appears to be of insufficient importance to warrant review.

In any event, the decision of the court of appeals is correct. A number of courts have held that a defense based on the statute of limitations is waivable, either expressly or by failure to raise it in timely fashion at or before trial. See *United States* v. *Williams*, 684 F.2d 296, 299-300 (4th Cir. 1982), cert. denied, No. 82-5411 (Jan. 10, 1983); *United States* v. *Akmakjian*, 647 F.2d 12, 14 (9th Cir.), cert. denied, 454 U.S. 964 (1981); *United States* v. *Wild*, 551 F.2d 418, 422 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977); *United States* v. *Kenner*, 354 F.2d 780, 785 (2d Cir. 1965),

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[4]A similar contention is pending before the Court now in *Meeker* v. *United States*, No. 82-2048.

cert. denied, 383 U.S. 958 (1966); *United States* v. *Franklin*, 188 F.2d 182, 186 (7th Cir. 1951); *Capone* v. *Aderhold*, 65 F.2d 130 (5th Cir. 1933). See also *Holloway* v. *Florida*, 449 U.S. 905, 908-909 n.5 (1980) (Blackmun, J., dissenting from denial of certiorari); *Vance* v. *Hedrick*, 659 F.2d 447, 452 (4th Cir. 1981), cert. denied, 456 U.S. 978 (1982); *United States* v. *Levine*, 658 F.2d 113, 121 (3d Cir. 1981); 1 C. Wright, *Federal Practice and Procedure, Criminal 2d*, § 193 at 705-708 (1982); 8 J. Moore, *Federal Practice* para. 12.03[1] at 12-17 to 12-18 (1982).[5]

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[5]Several cases suggest that this Court regards the statute of limitations as an affirmative defense that must be raised at trial. See *Biddinger* v. *Commissioner of Police*, 245 U.S. 128, 135 (1917) (declining to consider statute of limitations in habeas corpus proceeding on the ground that it is a defense and must be asserted at trial in the state courts); *United States* v. *Cook*, 84 U.S. (17 Wall.) 168, 178 (1872) (holding that criminal statute of limitations could not be raised by demurrer to the indictment). Cf. *Finn* v. *United States*, 123 U.S. 227, 232-233 (1887) (noting in the context of a civil case that the statute of limitations generally can be waived by the parties).

The Tenth Circuit, in the context of a tax prosecution, has concluded in *Waters* v. *United States*, 328 F.2d 739, 742-743 (1964), that the statute of limitations is "jurisdictional" and therefore not waived if not raised at trial. Cf. *Benes* v. *United States*, 276 F.2d 99, 108-109 (1960), in which the Sixth Circuit, also in a tax case, concluded that a statute of limitations creates a bar to prosecution that cannot be waived by agreement of the parties. Neither *Waters* nor *Benes* involved circumstances similar to those in this case. It is unclear whether those cases would be decided in the same manner today. Cf. Comment, *Waiver of the Statute of Limitations in Criminal Prosecutions: United States* v. *Wild*, 90 Harv. L. Rev. 1550, 1553-1554 (1977); Comment, *The Statute of Limitations in a Criminal Case: Can it Be Waived?*, 18 Wm. & Mary L. Rev. 823 (1977). Since *Waters*, this Court has denied certiorari in several cases involving this issue (see page 6, *supra*), and there is no reason to do differently here. If future cases suggest that *Waters* and *Benes* are still regarded as good law, the Court can consider at that point whether review is appropriate.

In *United States* v. *Hankin*, 607 F.2d 611 (3d Cir. 1979), also cited by petitioner (Pet. 7 n.6), it is unclear whether the statute of limitations defense was raised at trial. In any event, the Third Circuit has made clear in the more recent case of *United States* v. *Levine*, *supra*, that it views the statute of limitations as subject to waiver.

There can be little question that petitioner waived the statute of limitations defense. Although he was on notice that many of the overt acts alleged in connection with Count 7 took place more than five years before the indictment was handed down, petitioner failed to raise a statute of limitations defense before or during the trial. He made no written or oral request for a statute of limitations instruction, nor did he object to the court's failure to submit such a defense to the jury.

Petitioner contends (Pet. 8-9) that the statute of limitations is not a defense, but is an essential element of the government's proof that can only be waived knowingly and voluntarily. The court of appeals properly rejected this claim (Pet. App. 17a). Proof that a crime occurred within the applicable limitations period is not an element of the offense. See *United States* v. *Grammatikos*, 633 F.2d 1013, 1022 (2d. Cir. 1980) (failure to instruct the jury on statute of limitations is not plain error); *United States* v. *Wild, supra*, 551 F.2d at 421, citing *United States* v. *Cook*, 84 U.S. (17 Wall.) 168, 178-179 (1872); *United States* v. *Cianchetti*, 315 F.2d 584, 589 (2d Cir. 1963); *Capone* v. *Aderhold, supra*, 65 F.2d at 131. See also *United States* v. *Cook, supra*, 84 U.S. (17 Wall.) at 180 (time is not of the essence of the offense).[6] Thus, petitioner's failure to raise the defense in

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[6]Petitioner relies on *Grunewald* v. *United States*, 353 U.S. 391, 396-397 (1957), for the proposition that the jury was required to find that an overt act occurred within the applicable limitations period. This contention does not aid petitioner. In *Grunewald* the trial court did instruct the jury concerning the statute of limitations, and the Court's opinion does not address the effect of a failure to raise the statute of limitations defense at trial. In any event, the acquittal of Barbato does not necessarily mean that the jury found that Barbato did not commit one or both of the overt acts; rather, the jury may have concluded that Barbato did not knowingly join and participate in an unlawful scheme with petitioner. The evidence supports the conclusion that Barbato did commit the overt acts in response to petitioner's direction (see Pet. App.

the trial court constituted a waiver, and he may not now argue that the prosecution on Count 7 was time-barred.

2. Petitioner also contends (Pet. 11-16) that a defendant cannot be convicted and separate sentences imposed for both a substantive RICO offense and the predicate acts of racketeering that support the RICO violation. In petitioner's view, the racketeering acts are equivalent to the substantive RICO offense, and thus the imposition of cumulative fines is prohibited by the Double Jeopardy Clause of the Fifth Amendment.

Petitioner's double jeopardy contention was correctly rejected by the court below (Pet. App. 18a). The structure and purpose of the RICO statute clearly evidence Congress's intent to authorize cumulative sentences for the racketeering offenses and for the predicate acts of racketeering.[7] See also Pub. L. No. 91-452, Section 904(b), 84 Stat. 947, 18 U.S.C. 1961 note; S. Rep. No. 91-617, 91st Cong., 1st Sess. 124 (1969).[8] Petitioner's own attempts to distinguish the language and legislative history of the statute (Pet. 14-16) demonstrate that his argument lacks merit. It is

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5a; Tr. 3722, 3727-3732, 3293-3294, 3300-3304). See *United States* v. *Montgomery*, 440 F.2d 694, 696 (9th Cir.), cert. denied, 404 U.S. 884 (1971) (overt act requirement is met if an act in furtherance of the conspiracy is performed by an innocent person at a co-conspirator's direction).

[7]See, *e.g.*, 18 U.S.C. 1961 and 1962. See also Congress's expression of its resolve "to seek the eradication of organized crime in the United States * * * by providing enhanced sanctions and new remedies * * *" (Organized Crime Control Act of 1970, Pub. L. No. 91-452, Statement of Findings and Purpose, 84 Stat. 923, 18 U.S.C. 1961 note) and its directive that "[t]he provisions of [RICO] shall be liberally construed to effectuate its remedial purposes" (*id.*, Section 904(a), 84 Stat. 947, 18 U.S.C. 1961 note).

[8]Because the statute is unambiguous in this respect, there is no reason to resort to the rule of lenity. See *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980); *Barrett* v. *United States*, 423 U.S. 212, 217-218 (1976).

settled that where cumulative penalties are authorized by statute, the imposition of such penalties in a single sentencing proceeding following a single trial does not violate the Double Jeopardy Clause. *Albernaz* v. *United States*, 450 U.S. 333, 344 (1981). The courts of appeals have consistently sustained separate sentences for RICO offenses and the underlying racketeering acts. See *United States* v. *Hartley*, 678 F.2d 961, 991-992 (11th Cir. 1982), cert. denied, No. 82-624 (Jan. 24, 1983); *United States* v. *Welch*, 656 F.2d 1039, 1054 n.21 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982); *United States* v. *Dean*, 647 F.2d 779, 785 n.14 (8th Cir.), on rehearing, 667 F.2d 729 (1981), cert. denied, 456 U.S. 1006 (1982); *United States* v. *Scotto*, 641 F.2d 47, 56 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981); *United States* v. *Morelli*, 643 F.2d 402, 413 (6th Cir.), cert. denied, 453 U.S. 912 (1981); *United States* v. *Boylan*, 620 F.2d 359, 361 (2d Cir.), cert. denied, 449 U.S. 833 (1980); *United States* v. *Aleman*, 609 F.2d 298, 306-307 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Solano*, 605 F.2d 1141, 1143-1145 (9th Cir. 1979), cert. denied, 444 U.S. 1020 (1980); *United States* v. *Rone*, 598 F.2d 564, 571-572 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980). This Court has declined to grant review on that issue on several occasions.[9] Petitioner presents no reason why the Court should respond differently in this case.[10]

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[9]See *Scotto* v. *United States*, 452 U.S. 961 (1981); *Aleman* v. *United States*, 445 U.S. 946 (1980); *Little* v. *United States*, 445 U.S. 946 (1980).

[10]In any event, the jury indicated on a special verdict form that it found that petitioner had committed 15 of the predicate offenses alleged as a basis for Count 1 (six of which were within the five-year limitations period). See Pet. 3; Pet. App. 7a. Thus, petitioner would have been convicted of the substantive RICO offense even if the offenses addressed in Counts 3 through 6 had not been alleged as predicate offenses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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